No. 16-1150

In The Supreme Court of the United States

ELSA HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHLYN LOUISE HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST,
Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RETIRED UNITED STATES DISTRICT JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a party may appeal as of right from a judgment that resolves some but not all claims in a case consolidated for all purposes pursuant to Federal Rule of Civil Procedure 42(a).

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BRIEF OF RETIRED UNITED STATES DISTRICT JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici, all former United States District Court Judges, have extensive experience managing litigation and deciding case-processing issues involving multiple claims and parties, including motions to consolidate under Rule 42(a) and motions for Rule 54(b)

[1] All parties have consented to the filing of this brief. *See* Supreme Court Rule 37.3(a). No counsel for either party authored this brief in whole or in part, and no person or entity other than the *Amici* or their counsel made a monetary contribution to the brief's preparation or submission.

certification when cases, consolidated or otherwise, involve multiple claims or parties.

The Honorable **Frank C. Damrell, Jr.** served as a United States District Judge for the Eastern District of California from 1997 to 2011.

The Honorable **W. Royal Furgeson, Jr.** served as a United States District Judge for the Western District of Texas from 1994 through 2013.

The Honorable **John Gleeson** served as a United States District Judge for the Eastern District of New York from 1994 through 2016.

The Honorable **Faith Hochberg** served as a United States District Judge for the District of New Jersey from 1999 to 2015.

The Honorable **Barbara S. Jones** served as a United States District Judge for the Southern District of New York from 1996 through 2013.

The Honorable **Stephen M. Orlofsky** served as a United States District Judge for the District of New Jersey from 1996 to 2003 and a Magistrate Judge of that court from 1976 to 1980. Following his resignation from the bench, Judge Orlofsky served as a Special Master and was actively involved in multiple complex consolidated cases.

The Honorable **James Robertson** served as a United States District Judge for the District of Columbia from 1994 to 2010.

The Honorable **Shira Scheindlin** served as a United States District Judge for the Southern District of New York from 1994 to 2016.

Collectively, *Amici* have presided over hundreds of complex consolidated cases and thousands of cases involving multiple claims and parties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief shares *Amici* District Judges' real-world perspective on why partial appeals in fully consolidated cases should be allowed only when certified by the district court. As this Court's precedents and the Federal Rules of Civil and Appellate Procedure recognize, district courts are appropriately vested with great discretion to decide case-management issues, including when to enter final judgment, and whether to certify partial appeals before entry of final judgment on all claims.

The District Judge's settled role as an informed dispatcher of appeals serves the sound administration of justice, given the Judge's intimate familiarity with the parties, procedural history, and—in the case of partial judgments—a still-evolving factual record. Whenever a case involves multiple claims or parties—whether from the outset as framed in the original complaint, as the result of joinder or intervention, or because of consolidation—the District Judge is best-positioned to determine when partial appeal is appropriate.

Amici appear, as many of them did in *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015),[2] to highlight

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[2] Brief of Retired United States District Judges in Support of Respondents, *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015) (No. 13-1174).

for the Court the essential role district court judges play in the federal system as on-the-ground managers of complex litigation and effective dispatchers of appeals. In *Gelboim*, this Court ruled narrowly that, when a party's case is dismissed in its entirety from consolidated multidistrict litigation (MDL) pre-trial proceedings, that fully dismissed party's right to appeal under 28 U.S.C. § 1291 is automatically triggered, even though other cases remain pending in the MDL. The Court's ruling was grounded in the text of 28 U.S.C. § 1407; recognized that consolidation under § 1407 is for pre-trial purposes only; and emphasized the need to provide clear notice to fully dismissed parties in MDL proceedings about when their appeal clock is triggered, given the practical realities of multi-district litigation.

But the *Gelboim* Court expressly declined to rule on the question here: when cases are consolidated for **all purposes**, is there a similar automatic right to appeal a partial judgment when some claims remain pending in district court (often, as here, between the same parties). *See* 135 S. Ct. at 904-905 n.4, 906 n.7. *Amici* District Judges agree with Respondents that automatic early appeal under such circumstances is inappropriate, as it is in any multi-claim action that has been litigated as a single controversy. An automatic immediate appeal of part of the case while the overall litigation is ongoing contravenes the strong federal policy disfavoring piecemeal appeals, circumvents the district court's comparative advantage as dispatcher of appeals, and jeopardizes sound case management.

When claims in a fully consolidated case remain pending in the district court, as a rule no appeal should be allowed until the district court renders a final judgment on all claims. When warranted, early appeals of already-decided claims can be permitted with the District Judge's endorsement that the Rule 54(b) standard is satisfied. But permitting litigants an automatic early appeal of only a subset of claims will disrupt the district court's ability to manage the ongoing case, cause confusion for the parties, and generate all the inefficiencies of piecemeal appeals—including much duplicative and wasteful litigation—with no countervailing benefit. The better approach is to vest the district court—that has been actively managing the litigation and is uniquely positioned to weigh the equities of a partial appeal—with the authority to make the appeal call in the first instance.

ARGUMENT

I. THE DISTRICT COURT IS BEST-POSITIONED TO DETERMINE WHEN PARTIAL APPEAL IS APPROPRIATE IN A FULLY CONSOLIDATED CASE.

At issue here is who should decide whether an appeal is proper when all claims from a member sub-case in a fully consolidated action have been decided, but other claims remain pending—often, as here, between the same parties. District Judges regularly certify partial appeals in all sorts of cases involving multiple claims and parties, drawing upon their proximity, direct courtroom involvement, and immersion in managing the proceedings. In *Amici*'s experience, District Judges are the best actors to serve

as gatekeepers in service of the long-settled federal policy of "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). That is as true for fully consolidated cases as it is for other multi-claim matters.

A. This Court Has Long Recognized the District Court's Comparative Advantage as an Appellate Dispatcher.

Federal appellate jurisdiction turns on the district court's decision—not the litigant's, nor the appellate court's—to "end[] the litigation on the merits and leave[] nothing ... to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Accordingly, a "final decision" under 28 U.S.C. § 1291 is typically one "by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)).

District Judges are charged with this finality determination, and hence the appealability call, with good reason. They play a "special role" in managing ongoing litigation. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Under the federal rules, the district court exercises significant "power ... to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants" and such case-management decisions are left to "the exercise of [the district court's] judgment." *Landis v. North Am. Co.*, 299 U.S. 248, 254-255 (1936) (Cardozo, J.).

The final-judgment rule, under which "a party is entitled to a single appeal, to be deferred until final judgment has been entered" by the district court, *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), protects the autonomy and authority of District Judges in overseeing the litigation process. Section 1291's finality requirement preserves the District Judge's crucial case-management role, because allowing piecemeal appeals while the underlying litigation continues "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges" to manage their dockets. *Mohawk*, 558 U.S. at 106-107 (quoting *Firestone Tire & Rubber Co.*, 499 U.S. at 374).

In rare cases, it serves the administration of justice to permit early appeals of some, but not all, claims in an ongoing matter. Federal Rule of Civil Procedure 54(b) thus allows a district court "dealing with multiple claims or multiple parties" to direct the entry of partial final judgment upon an "express determination that there is no just reason for delay," when "the interest of sound judicial administration" and "the equities involved" so require. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 1, 8 (1980).

Under Rule 54(b) the District Judge serves as a "dispatcher" of appeals, to "meet the demonstrated need for flexibility" in certifying partial judgments. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). This decision is, "with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Id.* at 437. As this Court has recognized, the required "task

of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case." *Curtiss-Wright*, 446 U.S. at 12. *See also* 15A Wright & Miller, Federal Practice and Procedure § 3914.7 (2d ed. 1992) ("The choice to use the district judge as the 'dispatcher' who determines the desirability of immediate appeal takes advantage of the judge's close familiarity with the case.").

Rule 54(b) certifications (or the denial thereof) are reviewed by the Courts of Appeals under the highly deferential abuse-of-discretion standard. *Sears*, 351 U.S. at 437; *Allis-Chalmers Corp. v. Phil. Elec. Co.*, 521 F.2d 360, 363-364 (3d Cir. 1975). This well-established standard of review reveals, as well, this Court's judgment that the district court "is better positioned ... to decide the issue in question,"—i.e., whether immediate appeal of some, but not all, of the claims in ongoing litigation should be allowed. *Miller v. Fenton*, 474 U.S. 104, 114 (1985); *see also McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1166-1167 (2017); *Pierce v. Underwood*, 487 U.S. 552, 560 (1988).

In sum, both the Federal Rules and this Court's precedents recognize the district court's superior vantage point for engaging in the partial-appeal calculus, which requires fact-based judgment calls grounded in intimate procedural knowledge of the ongoing litigation, a sense of how the record is likely to evolve, and on-the-ground assessments of the litigants' likelihood to engage in gamesmanship. Such battlefield decisions are best made by the one observing the combatants. First-hand knowledge of all that has transpired, and what is likely to come next, allows the district court, in "a practical manner,"

to "properly tim[e] the release of final decisions in multiple claims actions." *Sears*, 351 U.S. at 438.

B. The District Court's Comparative Advantage as an Appellate Dispatcher Is Equal or Greater in a Fully Consolidated Case.

When the litigation at hand involves multiple claims because of the District Judge's own decision to consolidate separate cases, it makes even more sense for that same judge to make the call on whether, and when, to unravel any particular subset of claims for early appeal. *Cf. Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956) (whether compulsory or permissive, counterclaims are not to be evaluated differently from other claims in the district court's Rule 54(b) determination).

Any other rule effectively allows the parties to circumvent the district court's consolidation ruling; is unnecessary because Rule 54(b) works in the consolidated-case context to allow warranted partial appeals to move forward; and merely shifts the case-management burden to the court of appeals, which is ill-equipped to decide such case-bound issues in the first instance.

1. The district court's significant power to manage its docket includes the decision whether to consolidate cases under Federal Rule of Civil Procedure 42(a). What's more, "[t]he trial court's managerial power is especially strong and flexible in matters of consolidation." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013). To take the decision whether to release a subset

of claims for early appeal from "the district court that made the original decision to consolidate" jeopardizes this case-management authority. *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984). Requiring an early appeal of a subset of claims in a consolidated case simply because they comprise a particular sub-case, absent district court certification under Rule 54(b), would effectively allow litigants to circumvent the district court's consolidation ruling.

This undermines the district court's exercise of discretion in consolidating the cases to begin with, and allows the appellate court to prematurely second-guess the consolidation order before the proceedings have concluded, without the benefit of any reasoned opinion from the District Judge about the propriety of an early partial appeal. That second-guessing is all-the-more dissonant with sound principles of case management because orders granting or denying consolidation are typically not appealable.[3]

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[3] *See, e.g., Travelers Indem. Co. v. Miller Mfg. Co.*, 276 F.2d 955 (6th Cir. 1960); *Skirvin v. Mesta*, 141 F.2d 668, 671-672 (10th Cir. 1944); *Nolfi v. Chrysler Corp.*, 324 F.2d 373, 374 (3d Cir. 1963); *Alpine Glass, Inc. v. Country Mut. Ins. Co.*, 686 F.3d 874 (8th Cir. 2012); *Crum v. Atty. Gen. of the U.S.*, 187 Fed. App'x 316, 317 (4th Cir. 2006) (unpublished); *NAACP of La v. Michot*, 480 F.2d 547, 548 (5th Cir. 1973); *Levine v. Am. Export Indus., Inc.*, 473 F.2d 1008, 1008-1009 (2d Cir. 1973). Appellate courts retain interlocutory supervisory power over consolidation decisions via writ of mandamus, *see In re Repetitive Stress Injury Litig.*, 35 F.3d 637 (2d Cir. 1994), or under 28 U.S.C. § 1292(b), *see* Resp. Br. at 43 n.6. When Rule 42(a) consolidation determinations are reviewed after final judgment on all claims, appellate review is appropriately conducted under the abuse-of-discretion standard.

In the usual case, "[a]ppellate courts may not create jurisdiction by entering judgments on behalf of the district courts and then reviewing those judgments." *Middleby Corp. v. Hussman Corp.*, 962 F.2d. 614, 615-616 (7th Cir. 1992). Because the district court's decision to consolidate cases for all purposes already reflects a measured determination that the claims are best decided as a single controversy, this rule should apply with added force in fully consolidated cases. Only the District Judge should be able to override that determination before final judgment on all claims. Especially because "[t]he relationships that justify consolidation for trial often make consolidation on appeal desirable as well." Wright & Miller, *supra*, § 3914.7.

Because a fully consolidated case is "in practical consequence, but a single controversy," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974), the relevant question for appellate jurisdiction is not whether litigants declare themselves ready for an appeal on some subset of that controversy, but rather whether the district court's supervision of the litigation is complete. *See Cobbledick*, 309 U.S. at 326. And who better to make the decision when to "disassociate[] itself from the case," *Swint*, 514 U.S. at 42, than the District Judge that has been actively involved in managing the litigation since its inception.

2. Rule 54(b) works. District Judges are using it to effectively dispatch partial appeals in consolidated cases. Examples abound of district courts judiciously

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E.g., *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1313 (11th Cir. 2017).

applying Rule 54(b) in fully consolidated cases. In doing so, they draw upon their superior vantage point and hands-on knowledge of highly case-specific factors to weigh competing interests, and dispatch early appeals only when disentangling a subset of claims for early appeal comports with the sound administration of justice.

Thus, district courts regularly deny 54(b) certification in consolidated actions, as in other multi-claim actions, when, "the best way to ensure a timely resolution of ... closely intertwined claims ... is through the prompt trial of the remaining claims in [the] case, followed by a single consolidated appeal of any issues which have not been rendered moot by the trial of these remaining claims." *Ely v. Cabot Oil & Gas Corp.*, No. 3:09–CV–2284, 2015 WL 1963108, at *4 (M.D. Penn. May 1, 2015). *See also, e.g., Himark Biogas, Inc. v. W. Plains Energy LLC*, No. 14-1070-SAC, 2016 WL 3654764 (D. Kan. Jul. 8, 2016) (denying Rule 54(b) certification on arbitration award when patent cases remain pending and are related in an "unsettled" way to the resolved claims); *R. M-G, v. Las Vegas City Sch.*, No. CIV-13-0350, 2016 WL 10592142, at *3-4 (D.N.M. Feb. 25, 2016) (denying 54(b) certification because, *inter alia*, "there may be subsequent appeals related to [plaintiff's] damages claims in this case, [and] the Court is not confident that the Tenth Circuit will not have to revisit the facts and remaining legal issues of this case more than once"); *U.S. Bank Nat'l Ass'n v. Londrigan*, No. 15-3195, 2016 WL 6267933, at *2 (C.D. Ill. Oct. 1, 2016) (denying 54(b) certification in a consolidated action because "although the claims in the two cases were different, many of the factual allegations ... are very

similar or the same, ... [and] future developments in this case could moot the need to review").

But where the balancing of competing interests tips the other way, and District Judges "find no just reason to delay," they readily dispatch partial appeals under Rule 54(b). And in such instances, the certification is accompanied by a well-reasoned opinion that provides the dispatcher's experience-grounded analysis to the appellate court. *E.g.*, *Bunch v. Frank*, No. 1:14-CV-438-WTL-DKL, 2017 WL 67841, at *2 (S.D. Ind. Jan. 6, 2017) (54(b) certification issued when the sole claim at issue was a legal issue, dissimilar from unadjudicated claims; it was "unlikely that the appellate court would have to consider the similar issue a second time should the summary judgment order be reversed[;] ... [and] judicial economy would best be served by having the appellate court decide the issue ... before proceeding to trial against the [remaining] defendants"). Other examples of Rule 54(b) being effectively used to dispatch early appeals in litigation consolidated under Rule 42(a) include: *Allen v. Mayberg*, 577 Fed. App'x 728, 731 (9th Cir. 2014), and *Bayer Healthcare Pharm. v. Watson Pharm.*, 713 F.3d 1369, 1373 n.3 (Fed. Cir. 2013).

3. Under anything other than a bright-line rule that an early appeal in a fully consolidated case requires the district court's Rule 54(b) imprimatur, the system breaks down.

When undertaking deferential review of the grant or denial of a Rule 54(b) motion, the courts of appeals benefit from a reasoned explanation of why, after "weighing and balancing the contending factors,"

Curtiss-Wright, 446 U.S. at 12, the district court deemed it appropriate to dispatch one or more claims, but not all, for immediate appellate review. And as with other fact-bound determinations, the "proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure the conclusions derived from those weighings and assessments are juridically sound and supported by the record." *Id.* at 10.[4]

Such allocation of comparative judicial effort makes sense. The district court's proximity to the parties and day-to-day supervision of the case makes it uniquely situated to determine which claims, if any, can be properly disentangled for appellate review before final judgment. Balancing the costs of delaying review on a sub-set of claims against the benefits of a more fulsome record for the appellate court on all claims (or the possible mooting of the need for appeal entirely) is a decision "peculiarly ... for the trial judge." *Id.* at 12.

But for litigant-driven appeals that are bereft of the district court's analysis of highly case-specific factors, the reviewing court becomes one of first view rather than review, asked to rule in the first instance

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[4] Insufficient explanation can be grounds for the appellate court to find no jurisdiction, because "a proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of 'no just reason for delay.'" *Allis-Chalmers*, 521 F.2d at 364. *See also, e.g., Stockman's Water Co. LLC v. Vaca Partners, L.P.*, 425 F.3d 1263 (10th Cir. 2005) (appellate jurisdiction declined because Rule 54(b) certification order inadequate).

on case-management issues well outside its bailiwick. This is true whether the court of appeals' case-management function falls under the rubric of a case-by-case approach to finality, or under Petitioner's proposed rule (Pet'r Br. 13-15) that would deem every sub-case judgment final but require the court of appeals to take on time-consuming docket-management duties through orders to stay appeals or hold them in abeyance. Either approach turns upside down "the simple, definite, workable rule," provided by Rule 54(b), that appeal does not lie absent a final decision declared by the district court, and defeats the rule's "re-establish[ment of] an ancient policy with clarity and precision." Fed. R. Civ. P. 54(b) advisory committee's note to 1946 amendment.

The district court's strong comparative advantage in weighing the competing equities of partial appeals underpins the "virtually unanimous" rule in the courts of appeals that, for fully consolidated cases, Rule 54(b) certification is required to allow an appeal before final judgment on all claims. Resp. Br. at 2; *accord* Pet'r Br. 7-8 (conceding that many circuits apply a strong or irrebuttable presumption that cases consolidated for all purposes are not immediately appealable); *see also* Resp. Br. at 14 & n.2 (collecting cases).

Some circuits, however, have adopted a case-by-case approach to determine finality and appealability of partial judgments in cases that are consolidated to any degree. When applying case-by-case factors in the first instance, the courts of appeals are not playing their "proper role" of deferentially reviewing the district court's informed assessment. *Curtiss-Wright*,

446 U.S. at 10. Rather, they are starting from scratch, and working from a cold and incomplete record to apply factors indistinguishable from those that District Judges regularly consider under Rule 54(b). The same would be true under Petitioner's proposal: forcing the courts and parties to determine whether a stay is appropriate at a very early stage in the appeal when the reviewing court is utterly unfamiliar with the issues.

Tales from decisions applying the case-by-case approach to partially consolidated cases illustrate the difficulties. For example, when deciding whether to accept appellate jurisdiction over a litigant-initiated appeal of a member case when the rest of the partially consolidated litigation remains pending, the Fourth Circuit considers: "(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time ... [and] ([4]) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like." *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 39 n.5 (4th Cir. 1993).

If this list sounds familiar, that's because it is. The Fourth Circuit's partial-appealability factors are drawn directly from the well-worn *Allis-Chalmers* factors that govern the district court's Rule 54(b) analysis. *Compare* 11 F.3d at 39 n.5 *with* 521 F.2d at 364. *Accord Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996) (recognizing "separateness of the

claims" is a factor both in Rule 54(b) analysis and in the case-by-case appealability analysis undertaken by some circuits). It is a waste of judicial resources to have circuit courts undertake this case-specific, fact-bound analysis in the first instance. *See, e.g., McCullough v. World Wrestling Entm't, Inc.*, 838 F.3d 210, 213 n.5 (2d Cir. 2016) (dismissing appeal of two of six cases from a consolidated proceeding only after engaging in a laborious analysis).

A rule requiring Rule 54(b) certification to allow any partial appeal to go forward in a fully consolidated case would avoid this needless appellate effort. Particularly where the application of Rule 54(b) depends "upon the extent and purposes of the consolidation," *Lewis Charters, Inc., v. Huckins Yacht Corp.*, 871 F.2d 1046, 1048-1049 (11th Cir. 1989), who better to decide if partial appeal is warranted than the District Judge who first consolidated the cases and knows why she did so? Yet circuits would be left to decide this and other case-specific factors with no guidance from the district court under Petitioner's proposal requiring extensive appellate case management of automatically final sub-case judgments.

Such irrational allocation of judicial resources can be avoided by adopting a general rule that Rule 54(b) certifications are required for immediate appeal when a sub-case is dismissed from fully consolidated proceedings and other claims remain pending.

II. REQUIRING AUTOMATIC APPEALS OF PARTIAL JUDGMENTS IN FULLY CONSOLIDATED CASES WOULD WREAK HAVOC WITH EFFICIENT CASE MANAGEMENT.

So long as the district court retains its authority to act as appellate "dispatcher" in fully consolidated cases before final judgment is rendered in the full consolidated case, the district court can balance the "competing considerations underlying all questions of finality," which are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen*, 417 U.S. at 171 (internal quotation marks omitted).

Under a rule that inexorably requires immediate appeal of the resolution of any separate complaint within a fully consolidated case, however, there is no balance. Rather, the inconvenience and costs of piecemeal review are imposed in every case, whether there is any countervailing need or other benefit to the parties. Because district courts can and do enter Rule 54(b) judgments in fully consolidated cases warranted, the only additional appeals sent to the court of appeals under Petitioner's automatic-early appeal approach are necessarily those appeals that cause inefficiency and disrupt case management with little to no countervailing benefit.

The final-judgment rule "serves several salutary purposes," including "'promoting efficient judicial administration'" and avoiding "'undermin[ing] the independence of the district judge.'" *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-204 (1999) (quoting *Firestone Tire & Rubber Co.*, 449 U.S. at 374).

Requiring immediate appeals any time a district court order disposes of the claims in one sub-case within a fully consolidated case serves none of these goals, and instead undercuts them.

A. As for efficient judicial administration, the rule advocated by Petitioner is sure to create *in*efficiency in terms of wasteful re-litigation of the same issues, needless jousting over unclear appellate jurisdiction, and unnecessary appellate decision-making on issues mooted by further proceedings in the district court.

To start, in the vast majority of cases in which Petitioner's proposed rule requires an appeal that would not otherwise have been dispatched by the district court under Rule 54(b), the appellate court will be required to "decide the same issues more than once" in subsequent appeals—precisely the result that the district court's Rule 54(b) discretion is designed to guard against. *Curtiss-Wright.*, 446 U.S. at 8. Such inefficiency will likely be the rule, not the exception, given the usual factual or legal overlap in cases that are consolidated for all purposes. A Rule 54(b) judgment is rarely entered appropriately when the same parties are still litigating related claims in the district court. *See Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 630 (9th Cir. 2015) (rejecting 54(b) judgment where an appeal did not "resolve all of the [particular] plaintiffs' claims" because "[i]t will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain, simultaneously, contestants below") (internal quotation marks and citation omitted). But under Petitioner's rule, there would be no choice.

Courts of appeals have dodged the repeat litigation that would result from Petitioner's rule by treating a fully consolidated case as an action requiring a Rule 54(b) judgment for partial appeals. *See, e.g.*, *Doe v. Howe Military Sch.*, 227 F.3d 981, 985, 987 (7th Cir. 2000) (treating a fully consolidated case involving two different plaintiffs alleging sexual harassment as a single case to avoid "successive appeals on identical issues" in light of the "tremendous overlap" in the cases); *Rd. Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.*, 967 F.2d 145, 151-152 (5th Cir. 1992) (two consolidated actions "both arose out of the single employer/alter ego issue and their theories of recovery are virtually identical"); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) ("crux of both actions" was the same in two actions that were consolidated). But because Petitioner's partial-judgment-always-final rule sidesteps the district court's Rule 54(b) ability to assure that "there is a well developed record to support [an appellate] decision," Wright & Miller, *supra*, § 3914.7, the reverse will be true. Duplicative appeals are likely to occur in a context where the first appellate decision is based on the least-developed record,

Compounding these problems is the likelihood that a rule requiring immediate appeal in each sub-case will create uncertainty about appeal timing and therefore "eat[] up time and money as the parties litigate, [appellate jurisdiction,] not the merits of their claims." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010); *see Huene*, 743 F.2d at 704 ("[U]ncertainty as to the finality of the judgment could lead to the premature filing of a notice of appeal with the consequent waste of time and resources."). Even a purportedly bright-

line rule that judgment of each member case of a consolidated case triggers the time for filing an appeal will often leave murky whether a particular district court order finally and conclusively resolved all of the claims in a particular sub-case.

For example, if the district court enters orders that seriatim address particular types of claims from a number of sub-cases, and the district court does not maintain separate dockets, it may be difficult for the parties to determine when all of the claims stemming from a single complaint have been finally resolved, as there may be no separate judgment entered for a single case that has been fully consolidated with another. *Cf. Doe*, 227 F.3d at 985-987 (noting that the claims in one of two consolidated cases were dismissed over the course of three separate orders and no judgments were entered under Rule 58 until the conclusion of the entire consolidated case, with language that "confused matters").

Under the contrary rule, where Rule 54(b) certification is required to appeal a subset of claims, parties in fully consolidated cases face no such "quandary about the proper timing of their appeals." *Gelboim*, 135 S. Ct. at 905. Even when all the claims in one member case have been completely dismissed, it will be very clear when the time for appeal begins to run: when final judgment has been entered on all claims in the consolidated case unless the District Judge expressly certifies as final a sub-set of claims.

Beyond unnecessary litigation on threshold appealability issues, Petitioner's rule would generate wholly unnecessary appeals on the merits, too. As issues are often intertwined in cases consolidated for

all purposes, Petitioner's rule could easily result in appellate decisions that are subsequently mooted by the continuing proceedings in the district court.

Those appellate courts that have required a Rule 54(b) judgment or a final judgment in the entire consolidated case before allowing appeal have been able to avoid such potential mootness. *See, e.g.*, *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 497–98 (2d Cir. 2010) (holding immediate appeal not available for judgment "dismissing one of two cases that were consolidated for all purposes" when second case still pending in district court and "resolution of the pending action could moot the central issue in this appeal"); *Eggers*, 11 F.3d at 39 (holding appeal on widow's claim must await resolution of still-pending deceased miner's claim in fully consolidated case because if miner's claim allowed, widow would receive benefits under that claim, mooting appeal on widow's claim).[5] Under a rule requiring parties to file appeals as soon as any one member case in a fully consolidated case was resolved, early appeals that were later mooted would likely proliferate, as would duplicative or otherwise wasteful

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[5] This is consistent with the rule applied by most courts of appeals that a Rule 59 motion by one party in a fully consolidated case tolls the time for filing an appeal from any judgment in the consolidated case. *See, e.g.*, *Advey v. Celotex Corp.*, 962 F.2d 1177, 1180 (6th Cir. 1992). Like other proceedings ongoing in the district court, that court's ruling on a Rule 59 motion in one part of a consolidated case could obviate the need for appeal of another, related part of the case. *Cf. Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 59 (1982) (per curiam) (noting that Rule 59 motion can "prevent unnecessary appellate review").

litigation of all kinds. Such results undermine judicial economy.

B. The pervasive, negative effect on efficient judicial administration is not the only downside to Petitioner's proposed rule. That rule would also undercut the District Judge's independence and disrupt her ability to manage the remainder of the litigation.

Ordinarily, the district court retains authority to revise "any order or other decision, however designated," that adjudicates fewer than all claims in a case, at any point prior to entry of final judgment "adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Deeming "final" any order resolving all claims in a particular member case eliminates this revision authority, reducing the district court's flexibility to narrow the issues through initial orders that remain subject to revision or reopening depending upon other developments—like a substantially different factual record than expected being developed at trial on a closely related claim. Imposing final-judgment rigidity on any orders disposing of all claims in a member case—notwithstanding the close relationship of those claims to others in a different part of the consolidated case—will likely require district courts to leave more issues open and unresolved further into the litigation. And it will certainly reduce the district court's ability to flexibly and effectively manage the case.

More troubling still is the risk of inconsistent, conflicting judgments resulting from the court of appeals and the district court exercising simultaneous jurisdiction over intertwined claims. Ordinarily, "a

federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously," and the filing of a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. In practical reality, however, Petitioner's rule would lead to de facto simultaneous jurisdiction in many consolidated cases. Although the identical claims might not be at issue in both courts, substantially similar and overlapping claims likely would be, with the concomitant possibility of divergent results.

Rule 54(b) affords the district court a flexible and nuanced case-management tool that allows partial early appeal only when the District Judge is assured that a subset of claims can be safely disentangled from the ongoing litigation. And, when appropriate, interlocutory appeals under § 1292(b) or petitions for mandamus likewise allow for appellate review of pressing issues that cannot await final resolution of all claims. But under Petitioner's rule—where litigants of dismissed member cases have an immediate appeal of right—the district court's only case-management tool for avoiding simultaneous consideration of materially identical issues would be to put the rest of the case on hold. This blunt instrument is a poor substitute and will engender unwarranted delay compared to a thoughtful application of Rule 54(b).

Application of the mandate rule—the controlling force of the court of appeals' decision in a case, Wright & Miller, *supra*, § 4478.3—also becomes more complicated when both district court and appellate court are simultaneously deciding overlapping cases.

If the appeal of a sub-case from a consolidated case is an independent final-judgment appeal, then the court of appeals' judgment in that independent appeal might, or might not, yield a mandate for the rest of the consolidated case. That raises a serious risk of divergent judgments for nearly identical issues. And even if the court of appeals' judgment in the first piecemeal appeal *does* constitute law of the case for the rest of the consolidated case, it still may not control the further proceedings in the district court. Law of the case may not apply because new factual findings from an evolving record in the ongoing proceedings can undermine the "correctness of an appellate decision on the basis of information that was not before the appellate court." *Id.* The possible result is a district court judgment that is arguably inconsistent with the appellate mandate. This risk of dissonant judgments is all-the-more likely when district court litigation proceeds simultaneously with an appeal of one part of a fully consolidated case in isolation.

Worse still, such confusion about how partial appellate judgments affect ongoing litigation in the district court will likely yield more wasteful litigation. If a party believes that the district court's decision on a related claim does countermand the mandate in one of the piecemeal appeals from the consolidated case, there will be more litigation related to the timing of the mandate and the inter-relationship of the judgments. Yet another example of unnecessary litigation is thereby spawned by eliminating the district court's authority to determine when it is appropriate for judgments resolving only part of a consolidated case to be "dispatched" for appeal.

In sum, the district court is in the best position to be a vigilant steward of the resources of the courts and the parties, to ensure the efficient administration of justice, and to effectively manage the case. The determination of when a judgment becomes final and appealable for one part of a case consolidated for all purposes should reflect that reality.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted.

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